Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Implementation of Section 621(a)(1) of	)	
The Cable Communications Policy Act	)	**MB Docket No. 05-311**
Of 1984 as Amended by the Cable	)	
Television Consumer Protection and	)	
Competition Act of 1992	)	

REPLY COMMENTS OF FREEDOMWORKS

Introduction

FreedomWorks is an 800,000-member grassroots organization that promotes market-based solutions to public policy issues. Established in July 2004 through a merger of Citizens for a Sound Economy and Empower America, FreedomWorks has consistently pursued policies that foster free-enterprise and competition. FreedomWorks has been actively involved in a number of regulatory issues and has been particularly interested in technological advances and changes in the marketplace that bolster competition and consumer choice. In such instances it is critical that the regulatory framework adapt to the realities of the marketplace so that consumers are not unnecessarily restricted in their choices and the degree of competition in the marketplace is maximized.

After reviewing the initial comments submitted in these proceedings, we felt compelled to respond directly in opposition to the build-out requirements advocated by many municipalities and cable operators. We will address the negative impacts of build-out requirements from the following perspectives:

- Build-out requirements hurt consumers. They slow deployment of competitive networks, leaving more consumers facing higher prices and no choice for cable television.
- Build-out requirements are not necessary to ensure widespread deployment of competing services. Competitive Local Exchange Carriers were not required to provide service throughout their jurisdiction where they were

granted certificates to operate; yet today, more than 95 percent of Americans live in a zip code with access to competitive local phone service.

- Just as applying LATA boundaries and universal service mandates to VoIP makes no sense, applying franchise terms like build-out requirements makes no sense for DBS, IPTV, or other competing video services.
- Finally, it has taken the cable industry as much as thirty years to actually comply with the build-out requirements. Even so, most jurisdictions have exempted less densely populated areas from such requirements. Those concessions have left many rural homeowners with no access to cable television. In contrast, the major telecommunications companies have announced plans to complete their entire network upgrades in less than 10 years. Thus, competition, not government mandates is the most efficient way to achieve the goal of maximizing the spread of new technologies.

I. Build-out requirements hurt consumers

A recent study by the Phoenix Center found that build-out requirements create a significant barrier to entry and dramatically lower the number of communities in which video services can be rolled out profitably[1]. In turn, this reduces the number of consumers who will benefit from cable choice, and delays the rollout of competitive cable networks. The report concludes that build-out requirements will always make consumers worse-off, and further refutes the notion that build-out requirements are necessary to prevent redlining by demonstrating that build-out requirements actually exacerbate the redlining threat by creating a legally sanctioned method for cable operators to bypass entire low value communities.

While it is almost impossible to calculate the cost of a foregone opportunity, a recent study by Jerry Ellig[2] estimates the annual consumer welfare cost of cable's monopoly at $8.6 billion. The cable industry's use of build-out requirements to thwart competition has run for almost a decade, but Ellig's estimate makes it clear why time is of the essence for consumers.

II. Competition has been successful in lowering telephony prices, suggesting that the Commission should apply the same deregulatory framework it applied to CLEC and VoIP Providers to promote competition in video services.

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[1] George S. Ford, Thomas M. Koutsky and Lawrence J. Spiwak, "The Consumer Welfare Cost of Cable 'Build-out' Rules," Phoenix Center Policy Paper No. 22 (July 2005).

[2] Jerry Ellig, "Costs and Consequences of Federal Telecommunications Regulations," 58 *Federal Communications Law Journal* 37 (2006)

In spite of explicit preemption of state laws that subject new telephone entrants to any "build-out" requirements[3], the most recent Report on Local Telephone Competition found that 95 percent of Americans live in a zip code with access to at least one competitive local exchange carrier (CLEC)[4]. Competition in the phone business is working to drive down prices, and with VoIP, services like Skype are pushing the cost toward zero.

In contrast, where cable regulators have relied on build-out requirements to ensure that everyone has access to competing cable services, less than 3 percent of cable communities have been determined by the FCC to be effectively competitive[5]. Allowing entrenched cable providers to retain this tremendous barrier to entry has also reduced competitive pressures on cable prices, which have almost doubled since the passage of the 1996 Telecommunications Act. Economist Thomas Hazlett notes that head-to-head wireline competition in the video programming market would provide an annual benefit of $9 billion to consumers, and an overall economic benefit of $3 billion per year.[6]

The Commission has a track record of success in removing unreasonable barriers to entry and should move quickly to remove the barrier of build-out requirements to allow competition to bring lower prices and greater innovation to cable consumers.

III. Applying Build-out mandates designed for the architecture of the cable industry to competing providers like DBS and IPTV is illogical at best and defeatist at worst.

The build-out requirements that the cable operators and Local Franchise Authorities are seeking to impose on competitive video providers were written specifically for the cable provider's network architecture. They exempt providers from building to areas greater than a certain distance from their head-end, or lower than a certain density per 5280 cable-bearing strand feet of trunk or distribution cable[7].

For a DBS provider these types of requirements are obviously inapplicable, but they are no less applicable for a telephone company or other network operator. Just as a DBS provider would gladly provide service to any consumer regardless of their density per cable-bearing strand foot, an existing network operator (like a

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[3] *See In the Matter of The Public Utility Commission of Texas,* CC Policy Docket Nos, 96-13, 96-14, 96-16 and 96-19, *Memorandum Opinion and Order,* FCC No. 97-346 (rel. Oct. 1, 1997) ("*Texas Build-Out Preemption Order*").

[4] http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0705.pdf

[5] Federal Communications Commission, "Report on Cable Prices," MM Docket No. 92-266, February 4, 2005. The figure reports effective competition as of January 1, 2004.

[6] Thomas Hazlett, "Cable TV Franchises as Barriers to Competition," George Mason University Law and Economics Research Paper Series, (March 2006).

[7] Language drawn from a random sampling of more than a dozen cable franchises available at http://www.mrsc.org/Subjects/Telecomm/cabletvpg.aspx

phone company) would gladly provide service to anyone within reach of their upgraded network.

Requiring those operators to meet build-out requirements designed for a cable television network can only serve the interests of those cable operators. Consumers within the franchise area, but outside of cable's build-out requirements, are the ones in most dire need of television service, and they are left out in the cold with cookie-cutter build-out requirements that do not recognize the unique characteristics of these new competitive video providers.

IV. Competition will bring Build-out Faster than Government Mandates

Broadband is perhaps the greatest success story for deregulatory parity. Telecommunications providers offer broadband on 80 percent of their wire lines and cable operators offer broadband to almost 90 percent of their subscribers. In aggregate, more than 95 percent of zip codes have 1 or more providers and more than half of all zip codes have 4 or more broadband providers[8].

Yet, there has never been a single build-out requirement for any broadband provider. In fact, broadband services have been progressively deregulated with each step spurring greater investment, more competition, and lower prices for consumers.

Today more American homes are passed by a provider of broadband Internet than by cable television, a statistic which clearly demonstrates that competition and free markets have succeeded where franchises and build-out mandates have failed.

Likewise, multiple nationwide cellular networks have been constructed and more recently they have been converted to carry broadband, all done without any build-out mandates

Conclusion

Build-out requirements are a no-win situation for consumers. Many will continue to have limited choice as competitive providers find that it is simply too costly to reengineer their networks to match the build-out requirements that local franchise authorities designed to accommodate cable architecture. Even those who live in a community that attracts a competitive provider will have fewer choices and longer waits than they would in a truly competitive marketplace.

The cable industry has been using franchise provisions like build-out requirements to erect barriers to entry that significantly limit competition. Cable prices have almost doubled at the same time that prices for virtually all other network services have been cut almost in half by vigorous competition.

We urge the Commission to act quickly to adopt rules which curtail the ability of LFA's to impose build-out requirements that ignore the fundamental

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[8] 2005 Trends in Telephone Service Report
http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf

differences in network architecture of competing video providers. This will remove a tremendous barrier to entry and subject the cable industry to the vibrant competition which has taken hold of the rest of the telecommunications industry.

Respectfully submitted,

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